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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/749,956	12/31/2003	Alan John Slesinski	F6180(V)	8587
201	7590	08/16/2006	EXAMINER	
UNILEVER INTELLECTUAL PROPERTY GROUP 700 SYLVAN AVENUE, BLDG C2 SOUTH ENGLEWOOD CLIFFS, NJ 07632-3100			STULII, VERA	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 08/16/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/749,956	Applicant(s) SLESINSKI ET AL.	
	Examiner Vera Stulii	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☒ Claim(s) 18 and 21 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>10/20/2005</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Objections

Claim 18 is objected to because of the following informalities: claim is dependent on itself. Appropriate correction is required.

Claim 21 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. The claim fails to further limit the total adjusted carbohydrate content per 2 tablespoon serving. Applicant is required to cancel the claim, or amend the claim to place the claim in proper dependent form, or rewrite the claim in independent form.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-3 and 19 are rejected under 35 U.S.C. 102(a) as being anticipated by **netrition.com** (*Sugar Free Twist Hazelnut Chocolate Spread*). In regard to claim 1 **netrition.com** reference discloses a nut spread comprising nuts (hazelnuts), added vegetable oil, sugar alcohols (polyols), etc.

In regard to total adjusted carbohydrate per 2 tablespoon serving limitations recited in claims 1-3 and 19, **netrition.com** reference teaches the following:

Art Unit: 1761

- Serving Size: 2tbsp
- Total Carbohydrates: 20g
- Dietary Fiber 1.4 g
- Sugar Alcohols (Polyols) 17g.

As described by Applicant in Summary of the Invention (Specification page 4, 2nd paragraph): *"By "adjusted carbohydrate" herein is meant the total carbohydrate in the indicated food or ingredient minus the total dietary fiber and sugar alcohol in that food or ingredient on a per serving basis"*. According to Applicant's definition of "adjusted carbohydrate", the nut spread disclosed by **netrition.com** reference has 1.6 g (20g –1.4g-17g) of total adjusted carbohydrate per 2 tablespoon serving.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

Art Unit: 1761

4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 4-13 and 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over **netrition.com** (*Sugar Free Twist Hazelnut Chocolate Spread*) as applied to claims 1 through 3 and 19 above, and further in view of Wong et al. (US Patent 6,623,783).

Claim 4 recites that nuts comprise peanuts. Reference **netrition.com** does not mention peanuts in the ingredients list. As evident by Wong et al. (US Patent 6,623,783), it is well established in the art to use peanuts among other nuts in the preparation of nut spreads (col.11, line 5). To therefore modify **netrition.com** and use peanuts for it's art recognized function would have been obvious (see col. 4, lines 42-50).

Claim 5 recites that vegetable oil comprises peanut oil. Reference **netrition.com** does not mention peanut oil in the ingredients list. Wong et al. (US Patent 6,623,783) provide evidence that it is conventional in the art to use peanut oil in the preparation of nut spreads (col.11, line 33,41). To therefore modify **netrition.com** and use peanut oil for it's art recognized function would have been obvious.

In regard to nuts percentage limitations recited in claims 6-8, **netrition.com** is silent about the amount of nuts used in preparation of nut spread. However Wong et al. teaches that nut spreads comprise "*from about 20 to about 55% nut solids*" (col.2 line 6). Since it is known in the art to use nuts in

Art Unit: 1761

proportion "from about 20 to about 55%", the particular proportional amount of nuts would have been an obvious routine determination.

In regard to vegetable oil percentage limitations recited in claims 9-10, **netrition.com** is silent about the amount of added vegetable oil used in preparation of nut spread. However Wong et al. teaches that *"For most nut spreads and especially flavored nut spreads, the ratio of fluid suspension to nut solids-containing mixture is typically in the range of from about 15:85 to about 60:40, and preferably in the range of from about 20:80 to about 50:50"* (col.9 lines 9-13) and *"The fluid suspension of sugar and liquid oil used in the following Examples is prepared from the following ingredients: Sugar 57.3% Peanut oil 41.7% Lecithin 1.%"* (col.11 lines 26-35). As noted above, the particular proportional amount of ingredients would have been an obvious routine determination.

In regard to added non-peanut protein percentage limitations recited in claims 11-12 and use of soy protein as recited in claim 13, **netrition.com** is silent about the amount of non-peanut protein and soy protein used in preparation of nut spread. However, Wong et al. teaches *"The nut solids-containing mixtures of the present invention can comprise solids other than nut solids and water soluble solids, typically in combined amounts of up to about 10%, preferably up to about 5%. These other solids can include fiber, such as cellulose, flours (e.g., wheat, rye, pea) and protein supplements such as additional peanut solids, soy flour, soy concentrate, soy isolate, casein, egg whites, and protein from other animal or*

Art Unit: 1761

vegetable sources; or any combination thereof" (col.6 lines 32-40). To therefore modify **netrition.com** and use added non-peanut protein such as soy for its art recognized function in proportions taught by Wong et al. would have been obvious.

In regard to fat percentage limitations recited in claims 16 through 18, **netrition.com** is silent about the amount of fat contained in the nut spread. However Wong et al. teaches that nut spreads comprise "*from about 30 to about 60% total fat*" (col.2 line 7). In addition, Wong et al. teach that the total fat present can vary widely depending upon the viscosity desired, the fat level desired and the like factors (Col.5, lines 39-51). Since it is known in the art to produce nut spread with total fat content "from about 30 to about 60% ", one skilled in the art would have been motivated to add the fat in order to achieve desired viscosity, fat level, etc. as taught by Wong et al. The particular proportional amount of nuts would have been an obvious routine determination. Such proportion would depend on the viscosity, fat content desired and the like factors.

Claims 14-15, 20-22, and 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over **netrition.com** (*Sugar Free Twist Hazelnut Chocolate Spread*) as applied to claims 1 through 3 and 19 above, and further in view of Wong et al. (Pub. No. US 2002/0106441 A1).

Claims 14 and 20-22 recite that nut spread comprises a high intensity sweetener. Reference **netrition.com** is silent about a high intensity sweetener. Wong et al. teaches that "*Artificial sweeteners such as aspartame, acesulfam,*

Art Unit: 1761

saccharine, cyclamate and glycerrhizin can also be used in the nut spreads of the present invention" (page 4, paragraph 61). The amount of artificial sweetener used depends on upon its sweetness intensity. Sweeteners are included in amount that provides sweetness intensity equivalent to the addition of about 0.5 to about 10 sucrose. To therefore modify netrition.com and use high intensity sweetener for its art recognized function, that is to provide sweetness equivalent to sucrose, would have been obvious.

In regard to claim 15, 23, and 24, which recites a particular level of high intensity sweetener, **netrition.com** is silent about a high intensity sweetener. However, Wong et al. teaches that "*The amount of artificial sweetener used depends on its sweetness intensity. Typically, these artificial sweeteners are included in amount that provides a sweetness intensity equivalent to the addition of from about 0.5 to about 10%, preferably from about 1% to about 7%, sucrose. Usually from about 0.001% to about 2% artificial sweetener is used*" (page 4, paragraph 61). To therefore modify **netrition.com** and use high intensity sweetener for its art recognized function in proportions taught by Wong et al. would have been obvious.

Art Unit: 1761

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS


MILTON I. CANO
SUPERVISORY PATENT EXAMINER